SUPREME COURT, U. S.

FILED

FEB 28 1968

JOHN F. DAVIS, CLERK

BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1027

ROBERT WAVERLY HICKS, *et al.*,
Petitioners,

v.

PHYSICAL THERAPISTS EXAMINING BOARD
OF THE DISTRICT OF COLUMBIA,
Respondent.

On petition for a Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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PRINTING DIVISION—D. C. GOVERNMENT

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

Where, in the construction of a professional licensing statute of purely local application, the District of Columbia

Court of Appeals concluded that petitioners lacked the necessary qualifications to engage in the practice of physical therapy in the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit affirmed, should not this Court refuse to exercise its jurisdiction to review on writ of certiorari?

COUNTER-STATEMENT OF THE CASE

On September 16, 1963, petitioners filed applications for registration, without examination, as physical therapists pursuant to § 2-458, D. C. Code, 1967.[1]

Following the initial denial of their applications, petitioners, represented by counsel, were given separate public hearings at which they testified in conclusory fashion as to their background and experience, most of which was unrelated to physical therapy[2] (J. A. 32, 107-109, 110, 115, 116, 132-137, 204, 207, 210, 211, 215, 216. 247, 248, 250, 251, 254, 257, 260, 261). Petitioners at no time attempted to relate their alleged experience in any phase of physical therapy to either the number of hours devoted to its practice or to the number of patients treated, and they produced no records or case histories in this regard. Petitioners did not claim that they were ever employed at a hospital or nursing home, and they did not call as a witness or name as a reference, to attest to their alleged training and experience, any member of the medical or physical therapy professions.

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[1] "The Commissioners shall register as a physical therapist, without examination, any physical therapist who is at least twenty years of age and of good moral character and who presents evidence satisfactory to the Commissioners that she was, prior to the effective date of this subchapter, practicing physical therapy in the District of Columbia for a period of two years immediately preceding the effective date of this subchapter, and that she (1) has graduated from an approved school of physical therapy listed in the register of approved schools or (2) received comparable training or experience in the practice of physical therapy as determined by the Commissioners. * * *"

[2] The record negates the claim of petitioner Hicks (J. A. 2, 114) that he was for three years a pre-medical student at the George Washington University (J. A. 31).

Following the hearing, the Physical Therapists Examining Board concluded that petitioners had failed to submit satisfactory proof that they had practiced physical therapy in the District of Columbia during the two-year period immediately preceding the effective date of the Physical Therapists Practice Act (J. A. 89, 202, 245). The Board also concluded that petitioners (who admittedly had not graduated from an approved school of physical therapy) had not demonstrated that they had received comparable training or experience in the practice of physical therapy (J. A. 89, 90, 202, 245).

The District of Columbia Court of Appeals affirmed the orders of the Physical Therapists Examining Board denying petitioners' license applications (J. A. 187, 232, 269). The United States Court of Appeals for the District of Columbia Circuit allowed an appeal and affirmed the judgment of the District of Columbia Court of Appeals and thereafter denied petitions for rehearing *en banc* (petitioners' appendices D and E).

ARGUMENT

Petitioners have failed to present any question of substance warranting the exercise of this Court's jurisdiction to review on writ of certiorari.

The record does not disclose any ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the Rules of this Court. The case involves no more than the construction and application of the District of Columbia Physical Therapists Practice Act, and is, therefore, a matter of purely *local* significance. Under such circumstances, absent a clear showing of egregious error, this Court has consistently refused to exercise its jurisdiction. See *American Security and Trust Co.* v. *District of Columbia*, 224 U. S. 491 (1912); *Del Vecchio* v. *Bowers*, 296

U. S. 280 (1935); *District of Columbia* v. *Pace*, 320 U. S. 698 (1944); *United Surety Co.* v. *American Fruit Product Co.*, 238 U .S. 140 (1915); *Griffth* v. *United States*, 336 U. S. 704 (1949), rehearing denied, 337 U. S. 921 (1949); *Fisher* v. *United States*, 328 U. S. 463 (1946).

There has been no showing of egregious error here. Petitioners do not attempt to demonstrate that the decision of the United States Court of Appeals for the District of Columbia Circuit conflicts with the decision of another circuit court of appeals or with any decision of this Court. While they urge that the failure of respondent to promulgate rules or regulations implementing the statutory requirements for licensure was error, this Court has held otherwise. Under the doctrine of *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194, 203 (1947), the promulgation of such rules and regulations by respondent is not required, and it is within respondent's informed discretion to proceed by individual *ad hoc* considerations in applying the statutory licensing criteria.[3]

Petitioners attribute to respondent a series of procedural errors and attempt to convert such alleged errors into a constitutional issue involving procedural due process considerations. In this connection, what this Court said in *United Surety Co.* v. *American Fruit Product Co., supra*, is equally applicable here:

> "* * * The constitutional point is a mere pretext put forward in order to open other questions that otherwise could not come here. * * *" [238 U. S. at 142.]

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[3]Petitioners additionally urge that respondent evaluated their cases in accordance with a prejudicial standard which exceeded their authority. The record discloses that no such standard was utilized in the decisional process, and that respondent's decisions were based completely upon an application of the pertinent statutory criteria to the evidence adduced at the administrative proceedings (J. A. 104, 160, 161).

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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